IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 25, 2010 Session

WYATT JOHNSON v. VENTURE EXPRESS, INC. ET AL.

Appeal from the Circuit Court for Knox County
No. 1-587-08 Dale C. Workman, Judge

No. E2009-02402-WC-R3-WC - Filed January 28, 2011

The employee filed a workers' compensation claim against the employer for injuries sustained in a trucking accident. The trial court ruled that the employee was permanently and totally disabled as a result of the accident and entitled to full benefits. The employer appealed, alleging that the trial court erred in finding the employee permanently and totally disabled. The appeal was referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3) and Tennessee Supreme Court Rule 51. Because the evidence does not preponderate against the findings of fact made by the trial court, the judgment is affirmed.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed.

GARY R. WADE, J., delivered the opinion of the court, in which WALTER C. KURTZ, SR. J., and JON KERRY BLACKWOOD, SR. J., joined.

Thomas O. Sippel, Chattanooga, Tennessee, for the appellants, Venture Express, Inc. and Cherokee Insurance Company.

Louis Andrew McElroy, II, Knoxville, Tennessee, for the appellee, Wyatt Johnson.

MEMORANDUM OPINION

On October 29, 2004, Wyatt Johnson (the "Employee"), a truck driver employed by Venture Express, Inc. (the "Employer"), was injured when struck head-on by a car while

traveling on the interstate in Coffee County.[1] The Employee, twenty-nine years of age at the time of the accident, sustained injuries to the back. Within a day or two after the accident, the Employee returned to work for over two months. Although there is conflicting testimony on the subject of whether he was fired or voluntarily quit his job, the Employee left his employment in January of 2005. Afterward, he was able to qualify for commercial drivers licenses, first in Georgia and later in Florida. During the course of his medical treatment, the Employee saw a pain management specialist who, in July of 2006, referred him to Dr. Shahram Rezaiamiri, a neurosurgeon, who ultimately performed a two-level lumbar fusion surgery in September 2006. Dr. Rezaiamiri reviewed the results of a Functional Capacities Evaluation ("FCE") performed in 2007, which determined that the Employee should be limited in climbing stairs, bending, squatting, kneeling, crawling, and overhead reaching and could sit for up to thirty minutes, stand for fifteen minutes, and walk for twenty minutes at a time. The FCE also found that the Employee should be limited to lifting thirty-five pounds on only an occasional basis and no more than fifteen pounds, upon frequent lifting. Dr. Rezaiamiri, who testified by deposition, adopted the findings of the FCE as his own, but opined that thirty-five pounds was "borderline for what [the Employee] could . . . do on an occasional basis." He also concluded that an impairment rating of twenty-three percent to the body as a whole, which had been assessed by another physician who had treated the Employee, was "reasonable" and compliant with the American Medical Association Guides, Fifth Edition.

Jane Hall, a vocational evaluator, interviewed the Employee in June of 2008, reviewed his medical records, and administered achievement and IQ tests. Ms. Hall determined that the Employee had an IQ of seventy-four, was able to read at only a seventh-grade level, and could perform math at a fourth-grade level. She described the Employee as "borderline to mentally handicapped" with no transferrable vocational skills. After initially determining that the Employee had sustained a "vocational loss . . . of approximately eighty to eighty-five percent," Ms. Hall conducted a second interview in August of 2009 and revised her evaluation to a one-hundred percent vocational disability, asserting that it would be difficult for the Employee "to find <u>any type of work</u> in the current labor force." (Emphasis added).

Mike Galloway, a vocational evaluator hired by the Employer, also conducted an evaluation of the Employee. Using a newer test for reading and math skills, Mr. Galloway found that the Employee had an IQ of between sixty and seventy-four, could read at a sixth-grade level, and performed mathematics at a fifth-grade level. However, he felt that these

[1] The Employee is a resident of Georgia. Knox County does not appear to have any connection to the injury, but there is a statement contained in a pretrial motion that the Employee and the Employer "agree[d] to waive venue in order to expedite resolution of this matter and reduce costs for the parties involved."

scores did not completely reflect the Employee's learning capacity. In Mr. Galloway's opinion, the Employee had suffered an eighty percent vocational disability as a result of the work injury.

Johnny Snyder, who had been the terminal manager for the Employer, testified that the Employee was a good worker and "a good friend." Shortly after the accident, Mr. Snyder went to work for another trucking company as Safety and Human Resources Director. He acknowledged that the Employee had approached him "on several occasions trying to get work," but stated that he could not hire the Employee because of his physical limitations and the various pain medications he took as a result of the injuries in the accident. In Mr. Snyder's opinion, the Employee was no longer capable of working in the trucking industry.

The Employee, thirty-four years old at the time of trial, attended school through part of the ninth grade. Because of learning disabilities, he was classified as a special education student. He attempted to acquire a Graduate Equivalent Diploma on three separate occasions, but was never able to pass the test. Because he had failed a written qualifying test, he was unable to join the military. Prior to becoming a truck driver, the Employee had worked as a landscaper, roofer, busboy, deck hand on a tug boat, and a welder.

The Employee testified that the pain associated with constant stooping and bending precluded employment of the type he had performed prior to the accident. At the time of trial, he described his pain as constant. He continued to see a pain medication specialist and his prescriptive medications included a sleep aid, a narcotic drug for pain, an anti-inflammatory medication, and a muscle relaxer. The Employee stated that he did not "dare . . . get in a motor vehicle" because some of the drugs affected his ability to concentrate and react and that he often confused the accelerator and the brake pedal. The Employee stated that he had previously enjoyed hunting and fishing but could no longer engage in these activities because he was unable to stand or sit still for long periods of time. While he was able to mow his lawn and use a weed eater, he could only do so for thirty to forty minutes at a time. He testified that he was able to swim and maintain his pool. After his injury, his activities were largely limited to playing computer games online and helping his girlfriend take care of their sixteen dogs. He testified that he could think of no job or activity that he would be able to do for forty hours a week.

The trial court found the Employee to be permanently and totally disabled and was "entitled to his weekly workers' compensation benefit rate of $525.08 per week from the date of his maximum medical improvement of December 13, 2007 until . . . eligible for full benefits of the Old Age Insurance Benefit Program under the Social Security Act compiled at 42 U.S.C. § 401 et seq."

Standard of Review

In Tennessee workers' compensation cases, review of a trial court's findings of fact is de novo, accompanied by a presumption of correctness of the finding, unless the evidence preponderates otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). "This standard of review requires us to examine, in depth, a trial court's factual findings and conclusions." Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991) (citing Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 675 (Tenn. 1991)). When the trial court has seen and heard in-court testimony, we must give considerable deference to its factual findings as to credibility or its assessment as to the weight to be given to that testimony. Trosper v. Armstrong Wood Prods., 273 S.W.3d 598, 604 (Tenn. 2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). The same deference need not be afforded findings based upon documentary evidence, such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). On questions of law, our standard of review is de novo with no presumption of correctness. Wilhelm, 235 S.W.3d at 126 (citing Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003)). "Although workers' compensation law must be construed liberally in favor of an injured employee, it is the employee's burden to prove causation by a preponderance of the evidence." Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008).

Analysis

There is no dispute that the Employee sustained the injury in the course and scope of his employment. The issue presented for review by the Employer is whether the Employee was entitled to an award of permanent and total disability as a result of his work injury. Further, the Employer argues that the trial court improperly admonished the Employer for "firing" the Employee despite a prior stipulation that he had voluntarily left his job.[2] The Employer implies that the trial court took this incorrect assessment into account despite assurances on the record to the contrary.

In the findings of fact, the trial court accredited the testimony of both the Employee and Ms. Hall and subsequently found the Employee to be permanently and totally disabled. Our review of the record leads us to the conclusion that the evidence does not preponderate against the trial court's findings. Tenn. Code Ann. § 50-6-225(e)(2). The trial court was able to observe both the Employee and Ms. Hall firsthand, Trosper, 273 S.W.3d at 604; Whirlpool

[2] The portion of the record cited by the Employer contains no such stipulation. As stated previously, the testimony is in conflict as to whether the Employee voluntarily left or was fired. For example, during direct examination, the Employee stated that he was fired, but on cross-examination, he admitted to informing the Employer that he was going to move to Florida in January 2005. However, when asked if the move to Florida was the reason he was no longer able to work for the Employer, he answered "No, sir." Although the Employer's characterization of this point is inaccurate, it does not affect our decision.

Corp., 69 S.W.3d at 167, and was persuaded by their testimony that the Employee would likely be unable to obtain and succeed in any type of employment due to his physical condition and medication regimen. While the workers' compensation law must be construed liberally in favor of an injured employee, an employee has the burden to prove causation by a preponderance of the evidence. Crew, 259 S.W.3d at 664. In our view, the record clearly demonstrates that the Employee met his burden in this instance. The trial court did not commit error by making an award of one-hundred percent permanent and total disability.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to the appellants, Venture Express, Inc. and Cherokee Insurance Company, for which execution may issue if necessary.

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GARY R. WADE, JUSTICE